

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 28 of 2010

BETWEEN

CHEUNG MAN KOK

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 24 August 2011

Date of Handing down Written Decision with Reasons: 12 December 2011

DECISION

The Complaint to the Commissioner

1. Dynasty Court has an owners committee. It held a meeting on 10 May 2010. The Appellant, Ms Cheung, was then a committee member. She attended the meeting but left early after failing to challenge the attendance of other owners who were not committee members. The next meeting was held on 14 May 2010. Non-committee member owners were also permitted to attend. Nonetheless Ms Cheung

attended this second meeting. Not only did she attend the meeting, she spoke her views on various matters.

2. One Ms Ling, an owner of Dynasty Court, was present at both meetings. She tape recorded part, if not the whole, of the proceedings. Despite the protest of Ms Cheung, tape recording by owners present was permitted by the owners committee as usual.
3. On 20 May 2010, Ms Cheung's solicitors Ms Christine M Koo & Ip ("CMK&I") sent a data access request ("the DAR") on her behalf pursuant to section 18 of *the Personal Data (Privacy) Ordinance* ("the Ordinance"). The requested data are the views and conversations of Ms Cheung at the two meetings. Ms Ling refused to comply with the request. In her refusal letter of 25 June 2010, she gave the simple reason that the requested data were not the personal data within the meaning of the Ordinance. Dissatisfied with the refusal, Ms Cheung authorized CMK&I to lodge a complaint with the Respondent ("the Commissioner").

Particulars and nature of Complaint

4. The narrative details of the complaint are in the complaint form and the covering letter. From these documents, it can be gathered that Ms Cheung alleged that Ms Ling had breached the following provisions of the Ordinance:
 - (1) under sections 18 and 19, and, Data Protection Principle 6, for failing to comply with the DAR;
 - (2) Data Protection Principle 1 for collecting her personal data unlawfully and unfairly, by tape-recording what she said

without her explicit consent and knowledge and despite her protest.

The complaint involves three issues. Firstly, whether the data Ms Ling alleged to have collected in the tape recording are personal data within the meaning of the Ordinance. Secondly, if these data are such personal data of Ms Cheung, whether the collection of the same, without her explicit consent is unfair or unlawful, in the particular circumstances of the case. Thirdly, whether any of the exemptions provided under section 52 of the Ordinance applies.

Enquiry by the Commissioner

5. The Commissioner made the usual preliminary enquiry into the circumstances giving rise to the complaint. Notably Ms Ling was quite indignant that she should be put to all the trouble of answering each and every question asked of her in the course of enquiry. She took the point that she should not be questioned in such details before the complainant had made out a prima facie case. Despite that, she cooperated in her own way with the enquiry, and she gave detailed narrative accounts of the events leading up to the two meetings. Based on these accounts and the materials provided by the Ms Cheung, the Commissioner came to his decision.

Reasons for Decision of the Commissioner

6. By letter dated 2 September 2010, the Commissioner notified Ms Cheung of his decision to decline a full investigation. Ms Cheung took issue with the reasons for his decision. On 27 October 2010, CMK&I, her solicitors, wrote to the Commissioner putting forward legal arguments and seeking amplification on certain points made by the Commissioner and not understood by Ms Cheung. In the same

letter it was conveyed to the Commissioner that he should reconsider his decision in the light of the submissions in the letter and that unless a response was made within the stipulated time Ms Cheung would seek judicial review. By letter dated 18 November 2010, the Commissioner made his responses to various issues and indicated he maintained his previous decision.

7. As rightly pointed out by counsel for the Commissioner, the subject matter of this appeal is the decision of the Commissioner as contained in his aforementioned letter of 2 September 2010. The Grounds of Appeal, however, referred to matters in the letter of response by the Commissioner dated 18 November 2010. With regard to this, this Board understands that the Commissioner adopts a fair position. He would take up all the challenges advanced in the Grounds of Appeal. In any event, the responses in his letter by way of responses reflect the view on matters, legal and factual, which should be taken to have been present in the mind of the Commissioner and affecting his decision. That being the case, the Board should look at the Grounds of Appeal as if they referred directly to the decision of the Commissioner.
8. After a preliminary enquiry, the Commissioner was of the view that it was unnecessary to make a full investigation into Ms Cheung's complaint exercising his discretion under section 39 of *Personal Data (Privacy) Ordinance* ("the Ordinance").
9. The Commissioner seeks to defend his decision on various grounds. Two grounds stand out and are specifically challenged in this appeal. The Commissioner is of the view that opinions and views expressed by Ms Cheung at the meetings do not amount to her personal data. This view is challenged on behalf of Ms Cheung. The Commissioner

is also of the view that in any event Ms Ling was collecting data for her personal use and therefore it is exempted by section 52 of the Ordinance from the application of Data Protection Principles. This view is also challenged.

Grounds of Appeal

10. The first ground of appeal is that the Commissioner erred in law. Contrary to the view of the Commissioner, the contention of Ms Cheung is that her views and opinions are her personal data. It is argued on her behalf that it is so because these views and opinions relate to her.
11. The second ground of appeal is that the Commissioner is wrong in citing the exemption from section 52 of the Ordinance. It is the argument of Ms Cheung that the scope of exemptions is limited and that in the circumstances of the present case the exemption does not apply. The previous decision of the Board (AAB No. 46 of 2006) was cited in support. Ms Cheung also doubts if the Commissioner has made sufficient enquiry into circumstances of Ms Ling's collecting and using the data for management of personal affairs.
12. The third ground of appeal as the Board understands is that the Commissioner fails to have proper regard to the main concern of Ms Cheung. Her main concern is the collection of her personal data. She alleges that tape recording her conversation at the meetings amounts to unfair and unlawful collection of personal data. That being the case, she argues that the Commissioner should launch an investigation.

Decision

13. Ms Cheung was absent at the hearing of the appeal. About two days before the hearing, she made an ex parte application by letter for adjournment. It was refused because the hearing date was imminent, the views of the other parties could not have been conveniently and practically canvassed, and the grounds for adjournment were not compelling. Her grounds for adjournment is that she requires time to deal with the written submission and a witness statement filed by Ms Ling. It is submitted on her behalf, that all along she thought that the appeal would only deal with the question of law. Now that a witness came up and she needed time to deal with the documents filed. At the hearing, the Board drew the attention of parties to the application for adjournment by Ms Cheung. Ms Ling opposed the application. To avoid any possible prejudice to Ms Cheung, Ms Ling did not call her witness and she made it clear that no new facts were raised in her written submission filed, and to avoid any doubt, she would not rely on any new fact, if any at all, introduced in her written submission filed. That being the case, the Board saw no reason to adjourn the hearing and the hearing proceeded in the absence of Ms Cheung.

14. One of the reasons for the Commissioner's decision could have been cogent. Yet the Board could not place any weight on it. In short it is said that it is not the primary function of the Commissioner to deal with this kind of dispute. In the instant case, the Commissioner might be able to justify his assertion that his limited resources should be better employed otherwise than in carrying out a full investigation into such personal dispute. Be that as it may, in all fairness to complainants in this case and in others, criteria for such dispute as deemed unworthy should be formulated properly and embodied in the declared policy. That this reason is not in the declared policy, this Board should place no weight on it, as a matter of law, when there is

no finance figures and case statistics to support this assertion. However there are other reasons supporting the decision of the Commissioner.

15. The first part of the complaint to the Commissioner relates to the data access request. The subject matter of request consists of views and opinions of Ms Cheung. It is not in dispute that the tape recordings contain these views and opinions of Ms Cheung. Equally it is not in dispute that these views and opinions were about the performance of owners committee and about conducts of those present at the meetings. To argue her case that these views and opinions of hers are her personal data, Ms Cheung cited a proposition in *Wu Kit Ping v Administrative Appeals Board [2007] 5 HKC 450*, namely, “views and opinions can constitute personal data if they relate directly or indirectly to the data subject”. It was a case of a patient seeking access to her medical record.
16. There is no reason for this Board not to agree with this proposition as propounded. Nor does the Commissioner take any issue with this proposition. The dispute turns on the correct interpretation of the term ‘relate’. Ms Cheung did not say clearly why and how the views and opinions in question ‘relate’ to her within the meaning of the proposition propounded in the case. She must have meant that they relate to her simply because she is the author of these views and opinions. If this is what she really means, she misconceives the proposition. The views and opinions in the case of *Wu Kit Ping* were held to be relating directly or indirectly to the patient because they were about her medical conditions and not because she was the author of the views and opinions. The proposition therefore does not assist Ms Cheung’s argument.

17. The Commissioner also seeks to rely on the same proposition to justify his view that the views and opinions of Ms Cheung are not her personal data. It is argued on his behalf that those views and opinions relates to third parties and therefore applying the proposition they are data of the third parties, say the owners committee etc. The proposition by itself does not preclude the possibility that these views can at the same time be the personal data of the author, in the instant case, Ms Cheung. However the Commissioner has other reasons to justify his view quite apart from this proposition.
18. Indeed the primary basis for the Commissioner's view is the provisions of the definition section of the Ordinance. For any data to become personal data of an individual, section 2 of the Ordinance lay down three criteria, all of which must be satisfied. Firstly the data must be relating directly or indirectly to the individual. Secondly from such data it is practicable for the identity of the individual to be directly or indirectly ascertained. Thirdly they are in a form access to or processing of the data is practicable.
19. In paragraph 17 of the Statement Relating to Decision submitted to this Board, the Commissioner said, "Besides, there is nothing before the Respondent to show that the Appellant's views and opinions on how the OC should be conducted (sic) and how the observer should behave during the Meetings amount to the Appellant's "*personal data*" under the Ordinance, taking into account that those views and opinions were not relating directly or indirectly to the Appellant."
20. Those views and opinions could be processed in such a way that they become personal data. In a sense these opinions and views could be just like photographs in *Eastweek Publisher Ltd v Privacy*

Commissioner for Personal Data [2001] 1 HKC 692 . It is true that Ms Cheung has shown some concern about the improper use the tape recording could be put to. The Commissioner has noted her concern but she fails to give any details. The information before the Commissioner was that the views and opinions in question were contained in the tape recordings and those views and opinion did not relate to Ms Cheung. That being the case, it is only right for him to come to the conclusion which he did that there is nothing to show that the views and opinions amounted to her personal data. In the premises the first ground of appeal fails.

21. Even if the tape recordings in question amount to personal data of Ms Cheung, the Commissioner accepts that Ms Ling only uses them to manage her personal affairs. Exemption under section 52 of the Ordinance applies. In this regard, the case of AAB No. 46 of 2006 was cited seeking to limit the application of this exemption. This Board agrees with submission of the Commissioner that the case was decided on its own facts and shed no light on the interpretation of section 52 of the Ordinance.
22. Section 52 provides clearly, inter alia, that personal data held by an individual and concerned only with the management of his personal affairs are exempt from the provisions of the data protection principles (and other provisions). If Ms Ling held the personal data for the purpose of managing her personal affairs, the exemption applies and the data protection principles become irrelevant. The Commissioner has noted the circumstances of the case, nothing from these circumstances makes him doubt the claim by Ms Ling that she hold the tape recordings for record purpose. Ms Cheung is not in a position to suggest anything else otherwise. Ms Ling being an owner

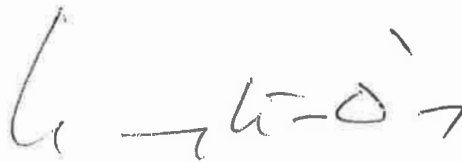
has a personal interest in the good management of Dynasty Court. Taking such personal interest is to manage her personal affairs. The stance taken by the Commissioner that she keeps the tape recordings for the purpose of managing her personal affairs is reasonable and cannot be faulted. The second ground of appeal therefore fails.

23. As to the third ground of appeal, since the data protection principles do not apply, the question of fairness and lawfulness in collecting data ceases to be relevant. In any event the Commissioner contends that there is nothing to show the recording is unfair or unlawful. This Board agrees. It is proper for the Commissioner to take all circumstances into account, in particular the practice of the owners committee to permit such recordings. That some of the owners present would tape record the proceedings was known at the time to Ms Cheung, albeit she might not know Ms Ling would also do the same. However there is nothing to show why Ms Ling should be regarded by her differently from the others. There is nothing unlawful for Ms Ling to tape record the proceedings. Nor is there unfairness to Ms Cheung when she could choose not to speak. It is understandable that a person might be intimidated or somewhat discouraged knowing his speech is to be recorded. That however is not unfair to the speaker in the circumstances. The third ground of appeal therefore fails.

24. At various stages Ms Cheung complains that a full investigation should be undertaken before Ms Ling is exonerated, if at all. This is tantamount to putting the cart before the horse. The Commissioner has a duty to make the best allocation of resources. It would be a waste of public resources to embark on a full investigation in every case. It is only common sense. Furthermore, the Ordinance

explicitly empowers him to refuse to carry out a full investigation or to discontinue one. There are specific circumstances in which he is empowered so to do. He is also given a residual discretion under section 39(2) of the Ordinance to refuse to carry out any investigation for any reasons. Of course, these reasons cannot be arbitrary and must be reasonable.

25. In the instant case, the Commissioner has made the preliminary enquiry. Facts he relied on to make his decision are either not in dispute or can reasonably be inferred. As a result of preliminary enquiry, there is nothing to show that data requested by Ms Ling amount to her personal data. There is nothing to show what probable and improper use of these data Ms Ling can put to. The circumstances suggest that Ms Ling held those data to manage her personal affair and nothing suggests otherwise. A prima facie case has not been made out against Ms Ling. It is not a good practice and against the declared policy to carry out a full investigation under such circumstances.
26. For the above reasons, this Board is of the view that the decision of the Commissioner is reasonable and cannot be faulted. The appeal is dismissed.



(Mr Yung Yiu-wing)

Deputy Chairman

Administrative Appeals Board